Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	

REPLY COMMENTS OF HANDS OFF THE INTERNET

Mike McCurry
Christopher Wolf
Co-Chairs
Hands Off The Internet
Post Office Box 3840
Arlington, VA 22203-0840

Christopher Wolf
Proskauer Rose LLP
1001 Pennsylvania Avenue, N.W.
Suite 400 South
Washington, D.C. 20004-2533

Counsel for Hands Off The Internet

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SUMMARY

Hands Off The Internet, the nationwide coalition supporting growth of the Internet for the benefit of consumers, highlights in these Reply Comments how, as anticipated, the proponents of Net Neutrality regulation uniformly have failed in their opening Comments to provide any concrete reasons why such regulation is needed or why the present legal and regulatory framework, combined with the dynamics of a competitive marketplace, are not sufficient protection.

As explained in our initial Comments, and as reflected in the Comments of many others, there is no current or anticipated content discrimination or service degradation justifying new regulations by the Commission. Moreover, regulation could well thwart Internet growth and make consumer access unfairly expensive. In contrast to the reasoned submissions of those against net neutrality regulation, proponents of net neutrality regulation have failed to identify a *single* consumer harm the Commission needs to address through the adoption of a new regulatory regime. Instead, these proponents rely, as they have now for several years, on conjecture, speculation and hypocritical assertions to suggest that the marketplace, notwithstanding the extraordinary success and continued growth of the Internet, must now be regulated in order to ensure consumers will be protected from non-existent harms.

Rather than succumbing to this unfounded speculation, the Commission should demand that proponents of such regulations identify specific and current harms or market failures caused by broadband providers that require a regulatory fix. Absent such identification, and there has been none (as a Federal Trade Commission staff report recently concluded), the Commission may comfortably rely on its current authority and on consumer protection laws to address any potential future consumer harm, anti-competitive actions or market failures.

Instead of imposing new regulations in the absence of a defined need, the Commission

should ensure that broadband access providers continue to have marketplace incentives to increase broadband capacity that will provide consumers with what they want: networks with the ability to efficiently handle the massive increase in data traffic that has occurred due in large part to video applications; a choice of a variety of distinctive provider and service options providing access to content of their choice; and the creation of competitive business arrangements by broadband access providers that will not result in content discrimination or service degradation, but will spread the cost of the new build-out consumers and content providers want in a way that will not saddle consumers with the entire cost.

For the reasons set forth in Hands Off The Internet's initial comments and explained in this submission, the Commission should refrain from adopting new "net neutrality" regulations.

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I. INTRODUCTION

Hands Off The Internet is a nationwide coalition of Internet users, manufacturers and network operators united in the belief that the Internet's growth will continue only if government does not attempt an unwarranted effort to regulate a market that is working well to give consumers increasingly better service, more choices and reasonable prices.[1]

In its initial comments, Hands Off The Internet shared with the Commission the results of its study and analysis of the marketplace for broadband deployment and the policy issues affecting future broadband deployment. We set forth our overall conclusion that there currently

[1] Members of Hands Off The Internet include 3M, Acriontec, ADC Telecommunications, Alcatel-Lucent, The America Channel, America Conservative Union, AT&T, BTech Inc., Communications Technology Solutions, Center for Individual Freedom, Cinergy Communications, Citizens Against Government Waste, Communications Systems, Inc., Condux International, Inc., DiamondWare, DSM Desotech, Electrodata, Inc., Enhanced Telecommunciations, Inc., FiberControl, Frontiers of Freedom, Hitachi Telecom (USA), Inc., Independent Technologies, Inc., JDS Uniphase Corp., Katolight Corporation, Latinos in Information Sciences and Technology Association, MRV Communications, Inc., MyWireless.org, National Association of Manufacturers, National Black Chamber of Commerce, National Coalition on Black Civic Participation, NetCompetition.org, NorthStar Communications Group, Inc., NSG America, Inc., OFS Optics, OnTrac Incorporated, Optical Zonu, Inc., Peco II, Inc., Prysmian Communications, Sumitomo Electric, Sunrise Telecom, Inc., Telesync, Inc., Valere Power, Inc., and Vermeer Manufacturing, Inc.

is no basis for the adoption of any new laws or regulations to address the speculative harms cited by proponents of net neutrality regulation to justify the adoption of a new regulatory regime. To the contrary, we demonstrated that the creation of such new rules to address non-existent problems more than likely will impede, rather than encourage, the growth of the Internet and the options available to consumers. Creating new rules also would ignore that there already are enforceable laws in place to protect consumers in the event any of these speculative harms come to pass in the future. To promote the best interests of consumers, we explained that network owners need to be encouraged, not burdened with unnecessary disincentives, to expand network capacity, to manage their networks in order to efficiently deliver service to customers and to enter into business arrangements with content providers as a reasonable way to allocate the costs of necessary network expansion and upgrades so that the full cost is not borne only by consumers.

In framing the discussion in its notice of inquiry as to whether there is a "need or not for additional regulation," the Commission made it clear to proponents of such regulation that "there has been no content discrimination or service degradation by broadband providers" and that it believes it already has the "ability to adopt and enforce" under its ancillary authority under Title I of the Communications Act the net neutrality principles in its 2005 Policy Statement.[2] Almost two years earlier, Commission Chairman Martin observed that "there's a significant difference between potential problems and problems that occur."[3]

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[2] *See In the Matter of Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52 (rel. Apr. 16, 2007) (hereinafter "NOI" or "Broadband Industry Practices NOI"), at ¶ 3 (citing the Commission's merger reviews of the SBC and AT&T, Verizon and MCI, and AT&T and BellSouth transactions), and at ¶¶ 2, 4-7.

[3] Marilyn Geewax, *Battle Emerges On Future Of Net,* The Atlanta J.-Const., Dec. 27, 2005, *available at* http://www.freepress.net/news/13064. *See also* Deborah Platt Majoras, Chairman, FTC, Luncheon Address, *The Federal Trade Commission in the Online World,* The Progress &

Notwithstanding the fact that proponents of new net neutrality regulations have been on notice for years that the Commission (as well as the Federal Trade Commission) understandably would need evidence of actual harm to justify deviating from market-based solutions and imposing government regulation, the comments submitted by these proponents to the Commission in response to its notice of inquiry, utterly fail to point to any specific problems resulting from conduct by broadband Internet access service providers that harms consumers or remotely suggests the need for a regulatory fix. Instead, the comments submitted by proponents of regulations continue to rely on their standard tactics of proposing hypothetical non-competitive and anti-consumer scenarios, distorting the realities of a growing competitive marketplace, hypocritically suggesting that only consumers, not the content or application providers who comprise the bulk of those seeking regulations, should bear the full cost of building new capacity and raising pejorative and unsupported allegations of so-called "discrimination."

Given the failure of regulatory proponents to develop concrete evidence of a current need for regulations, or to demonstrate that new regulations will not hinder network development or result in higher consumer prices, the Commission should not adopt new net neutrality regulations at this time.

Freedom Foundation's Aspen Summit 20 (Aug. 21, 2006) (hereinafter "Chairman Majoras Address"), *available at* http://www.ftc.gov/speeches/majoras/060821pffaspenfinal.pdf ("[T]hus far, proponents of net neutrality regulation have not come to us to explain where the market is failing or what anticompetitive conduct we should challenge.").

II. NET NEUTRALITY PROPONENTS ADVOCATE REGULATION BASED SOLELY ON CONJECTURE; FAIL TO RECOGNIZE THE COMPETITIVE MARKETPLACE FOR BROADBAND ACCESS; AND IGNORE THE SIGNIFICANCE OF CURRENT CONSUMER PROTECTION LAWS

Although it would seem unnecessary to make the point that government regulation is not a recommended course when there is no problem requiring a remedy, or when the threat of future problems is merely hypothetical, the comments submitted by proponents of net neutrality regulations have entirely lost sight of that fundamental principle of administrative law.[4]

For example, Google Inc. concluded that the FCC "should promptly initiate a rulemaking procedure to consider various incremental fixes, structural changes, a ban on most forms of packet discrimination, and an effective enforcement regime."[5] Its rationale, however, for deviating from the free market forces that have enabled Google to become one of the nation's largest Internet companies fails to cite *any* examples of specific consumer harm or anticompetitive acts by broadband providers requiring regulatory action. Further, Google's comments, and those of other proponents of net neutrality regulations, ignore the existence of effective enforcement mechanisms already in place to protect Internet consumers from hypothetical future actions by broadband providers that could adversely impact the free flow of content or stifle competition. Proponents of net neutrality regulation also mischaracterize the growing competitive environment among broadband providers.

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[4] *See Nat'l Fuel Gas Supply Corp. v. FERC*, 458 F.3d 831, 843 (D.C. Cir. 2006) (vacating federal agency order as unlawful under the Administrative Procedure Act where agency "cit[ed] no evidence demonstrating that there is in fact an industry problem").

[5] *See* Comments of Google Inc., at 43.

A. The FCC and the FTC Have Concluded That There Is No Evidence of Consumer Harm or Anti-Competitive Actions By Broadband Providers; Proponents of Net Neutrality Regulations Have Not Cited Any Such Evidence In Their Comments

In its NOI, the Commission put proponents of net neutrality regulations on explicit notice that the Commission did not detect any evidence of content discrimination or service degradation by broadband providers in the course of its review of proposed wireline and cable mergers.[6] This lack of objective evidence of a harm in need of a fix was dramatically reinforced this past month in the findings reached in a staff report of the Federal Trade Commission.[7]

The FTC's Staff Report, "Broadband Connectivity Competition Policy," while raising numerous concerns about the adoption of any net neutrality regulations at this time, specifically concluded:

> [T]o date *we are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers*. Policy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare, particularly given the indeterminate effects that potential conduct by broadband providers may have on such welfare.
>
> Further, as a byproduct of the ongoing debate over network neutrality regulation, the agencies have a heightened awareness of the potential consumer harms from certain conduct by, and business arrangements involving, broadband providers. Perhaps equally important, many consumers are now aware of such issues. Consumers – particularly online consumers – have a powerful collective voice. In the area of broadband Internet access, *they have revealed a strong preference for the current open access to Internet content and applications.*[8]

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[6] *See* Broadband Industry Practices NOI, at ¶ 3. *See also supra* note 3.

[7] Prior to the release of this report, which was subsequent to the submission of comments in the matter herein, the FTC Chairman also put "proponents of net regulation" on notice that they "have not come to [the FTC] to explain where the market is failing or what anticompetitive conduct we should challenge. . . ." *See* Chairman Majoras Address, *supra* note 3, at 20-21.

[8] *See* Federal Trade Commission Staff Report, *Broadband Connectivity Competition Policy*, June

Thus, despite extensive review by both the FCC and the FTC in the context of a "heightened awareness of potential consumer harms," no actual harms have been identified.

The only response offered by proponents of net neutrality regulations to this challenge to identify specific harms that require a regulatory fix, is to continue to offer speculative theories about hypothetical future anti-consumer acts by broadband providers. Google, by way of illustration, goes so far as to simply suggest that "discriminatory behavior" "may well be" occurring but just not detected.[9] Such reasoning is akin to Chicken Little crying that the sky is falling without even being hit with an acorn. In view of the absence of any concrete harm in need of a regulatory remedy, the FCC should refrain from adopting new regulations.

B. Proponents of Net Neutrality Refuse To Acknowledge the Existence of Laws That Are Sufficient To Address Any Potential Harms and the Commitment of Federal Authorities to Enforce Them

The comments submitted by proponents of net neutrality regulations ignore the fact, that federal regulators are quick to exercise existing authority to address any action with the potential of impairing competition in ways that could be harmful to Internet consumers.[10]

In short, regulatory proponents have offered no facts or reasonable theories to explain, for example, why the FCC will not adhere to its commitment to enforce the net neutrality principles in its 2005 Policy Statement if it believes such action is warranted.[11] As explained in our initial comments, the Commission, as recently confirmed by the U.S. Supreme Court, is fully empowered to take action against broadband providers under its Title I ancillary authority.[12] Nor

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2007, at 11, *available at* http://www.ftc.gov/opa/index.shtml (hereinafter "FTC Staff Report").

[9] *See* Comments of Google Inc., at 34.

[10] *See* Comments of Hands Off The Internet, at 13-22.

[11] *See* Broadband Industry Practices NOI, at ¶¶ 2, 4, 7.

[12] *See* Comments of Hands Off The Internet, at 14-16 (discussing *Nat'l Cable & Telecomms.*

have proponents of new regulations suggested any reason why the FTC Chairman is not to be believed when she promises that the FTC is committed under its existing authority to devote "substantial resources to monitoring market conditions in cyberspace and being alert to any [new] potential harms to competition and consumers" or that the FTC "will not hesitate to act using our existing authority" to address "anticompetitive conduct" by broadband providers.[13] There is simply no rationale to adopt a new layer of federal regulation when the regulators themselves, after close study, believe existing enforcement mechanisms are adequate to address any currently forseeable problems.

C. Proponents of Net Neutrality Regulations Also Have Failed To Establish That the Broadband Access Market Is Not Sufficiently Competitive To Prevent Market Failure

Our initial comments and those of many other submitters establish that the broadband market is served by diverse forms of broadband transmission and market participants. Indeed, competition in the broadband market recently has led to significant growth in the United States in broadband access availability. For example, the Commission has pointed out that high speed lines increased by over 50% in the United States from the second half of 2005 through the first half of 2006.[14] The recent FTC Staff Report also acknowledged the broadband access market is competitive, dynamic and evolving:

> While there is disagreement over the competitiveness of the broadband Internet access industry, there is evidence that it is moving in the right direction. Specifically, there is evidence at least on a national scale that: (1) consumer demand for broadband

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Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976, 996 (2005)).

[13] *See* Chairman Majoras Address, *supra* note 3, at 19-21.

[14] *See* FCC News Release, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* (rel. Jan. 31, 2007), *available at* http://hraunfoss.fcc.gov/edocs_publich attachmatch/DOC-270135A1.pdf.

> is growing quickly; (2) access speeds are increasing; (3) prices (particularly speed-adjusted or quality-adjusted prices) are falling; and (4) new entrants, deploying Wi-Fi, Wi MAX, and other broadband technologies, are poised to challenge the incumbent cable and telephone companies. Although this is merely a high-level snapshot of a dynamic, evolving marketplace, such evidence challenges the claims by many proponents of network neutrality regulation that the broadband Internet access market is a cable-telephone duopoly that will exist for the foreseeable future and that the two primary broadband platforms do not compete meaningfully.[15]

This competition in the broadband access market is a major constraint on any potentially-harmful conduct by any one broadband access provider.[16] There is, therefore, no basis to conclude that new regulations are needed because of anti-competitive behavior or marketplace trends.[17]

To the contrary, while incumbent cable operators and incumbent wireline telephone providers are the two most prevalent facilities-based providers of broadband service today, in addition to the vigorous competition among these providers, numerous other broadband alternatives, as indicated by the FTC Staff Report, including municipal and private Wi-Fi, 3G networks, Wi-Max and various terrestrial options, and developing satellite technology, all point to a growing competitive marketplace.[18]

Proponents of net neutrality such as Google, however, speculate that "the addition of

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[15] *See* FTC Staff Report, at 155-56.

[16] *See* Comments of Hands Off The Internet, at 6-10.

[17] *See, e.g.*, Broadband Industry Practices NOI, at ¶ 11 (characterizing the broadband market as showing "ever increasing intermodal competition among broadband providers"); FTC Staff Report, at 155-56; Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*, 19 FCC Rcd 2196, ¶ 22 (2004) ("the preconditions for monopoly [in broadband] are not present"); *Earthlink v. FCC*, 462 F.3d 1, 11-12 (D.C. Cir. 2006) (noting, in affirming the Commission's UNE unbundling forbearance order that the Court had previously "upheld in resounding terms" the Commission's finding of a "sufficiently competitive environment" in broadband).

[18] *See generally* Comments of Hands Off The Internet, at 8.

several other broadband competitors may not be sufficient to constrain anticompetitive or discriminatory practices" and argue that the costs of building and operating a nationwide broadband system capable of competing with other market participants present "significant barriers to entry" for would-be market entrants.[19] This speculation simply ignores the fact that competitive broadband alternatives are not just national in scope – they exist at the local level.[20] Obviously, start-ups who operate in one or just a few markets do not require the capital needed to develop a nation-wide broadband alternative. Yet, local alternatives are significant sources of competition.[21]

In view of a growing and changing competitive landscape, there is no reason for policy makers to accept the speculation offered by proponents of regulations or to adopt regulations when there have been no market failures.[22]

III. BROADBAND PROVIDERS SHOULD NOT BE REQUIRED TO FOLLOW A BUSINESS MODEL THAT COULD SADDLE CONSUMERS WITH THE FULL COST OF NETWORK EXPANSION

The Internet is reaching the point where there is a risk that current capacity will not be able to keep pace with the increasing content flows that consume high amounts of bandwidth. Not only has the need to expand network capacity increased with the development of new

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[19] *See* Comments of Google Inc., at 14, 16.

[20] *See, e.g.*, WiMAX Economics, *available at* www.wimax.com/education/wimax/economics (stating that "the barrier to entry for WiMax service is very low relative to other broadband technologies" and noting the competitive threat to incumbents in local markets). *See also* http://grandecom.com/, the website for Grande Communications, a cable overbuilder who provides broadband service primarily in certain Texas communities. Many other cable overbuilders like RCN, Wide Open West, Knology and SureWest provide broadband service in direct and intense competition with incumbent cable operators in various specific communities, but not on a national basis.

[21] *Id*.

[22] *See generally* Comments of Hands Off The Internet, at 10-13.

applications, the need to manage networks has grown as well to ensure smooth delivery of an ever growing number of applications.[23]

As detailed in our initial Comments, to manage the extraordinary demands on network capacity, network owners require the flexibility to enter into business arrangements to allocate the costs of network expansion so that the full cost of this upgrade does not fall only on consumers of Internet services with the result that broadband access would be prohibitively expensive for many consumers.[24] In short, given the competitive broadband access environment, the deals being made by content and applications providers, and the massive costs to upgrade the networks, it follows that broadband access service providers should be free to enter into business arrangements providing for "multi-sided pricing" as long as they follow the Commission's Policy Statement concerning the Internet and broadband.[25]

Content and application providers, however, argue that they should be the only ones given the flexibility to enter into new agreements and business models dictated by a changing competitive environment. They are unabashed in arguing that broadband providers should be locked-in to the structures that existed when network capacity was sufficient to meet the demands of Internet consumers. Google, for example, frames the argument as follows: while it "does not dispute that the broadband providers should have the ability to manage their networks, as well as engage in a broad array of business practices," it is only consumers that should pay for expanded network capacity, notwithstanding the fact that content providers will equally benefit

[23] *See generally id*. at 22-25.

[24] *See generally id*. at 26-30.

[25] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005).

from the billions of dollars to be invested by broadband providers.[26]

In addition to its potential detrimental impact on consumers' ability to purchase broadband access in the future, Google's hypocritical proposal is inconsistent with its own business model. Google, of course, offers an advertisement supported search engine which does not charge consumers yet enters into business arrangements with various third parties. It also does not square with ad-supported broadband Wi-Max networks, such as those Google is involved with in San Francisco and elsewhere.[27] There is no logical basis for the differentiation Google and others seek through regulation.

IV. ARGUMENTS OF PROPONENTS OF NEW REGULATION ABOUT "DISCRIMINATION" ARE UNFOUNDED

As addressed in Part II, *supra*, proponents of new net neutrality regulation rely on pure conjecture about potential harms to advance their position. Nowhere is this more apparent than in arguments by proponents of net neutrality about the supposed economic incentives for network operators to discriminate and the effects of such "discrimination" – broadly defined by the proponents of new regulation to include not only blocking or degradation, but even pro-competitive network management and traffic prioritization. Net neutrality proponents, in particular large content and applications providers, seek under the guise of preventing "discrimination" a regulatory regime that inhibits free market business arrangements serving their interests to the detriment of Internet consumers.

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[26] *See* Comments of Google Inc., at 22-25.

[27] *See, e.g., Earthlink and Google Win San Francisco Wi-Fi Bid,* C/NET News.com (Apr. 6, 2006), *available at* http://news.com.com/EarthLink+and+Google+win+San+Francisco+Wi+Fi+bid/2100-7351_3-6058432.html.

A. Proponents of Net Neutrality Regulation Rely on Unsound Economic Theory

Some of the proponents of net neutrality rely on specious economic arguments that are contrary to established economic theory to argue that harmful discrimination by broadband access providers might occur. For example, Google, recognizing the frailness of its advocacy because of the clear trend toward greater competition in the broadband access provider market, argues that "projected or even optimistic levels of competition" may "increase the likelihood that existing broadband providers will exercise market power to exclude or discriminate against competitors in the complementary market of Internet services."[28] Even the source Google cites for this dubious proposition, however, *acknowledges that it is contrary to accepted economic theory*.[29] Google ignores the conflicting economic incentives that even a broadband access provider with market power faces – the desire to please and attract new customers.[30] In a dynamic, competitive marketplace such as exists today, that incentive to attract customers, and therefore not block or degrade the service of any content provider, is only amplified. To the extent a competitive environment does produce some product differentiation between network operators, that would be pro-consumer.[31]

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[28] *See* Comments of Google Inc., at 16.

[29] *See* Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. TELECOMMS. & HIGH TECH. L. 329, 368-69 (2007) (acknowledging her theory is not consistent with "standard economic thinking" and "economic theory").

[30] *See* Comments of Hands Off The Internet, at 12 (citing AEI-Brookings Joint Center for Regulatory Studies, *Economists' Statement on Network Neutrality Policy*, Mar. 2007, at 2). *See also* FTC Staff Report, at 157 ("the broadband provider also may have an incentive to maximize the value of its network to end users. Blocking or discriminating against content and applications desired by the provider's customers likely would diminish the value of the network"). It is significant that the FTC Staff Report also notes that "as long as consumers have one or more alternatives to which they can turn, it is difficult to imagine them accepting the blockage or elimination of content that is important to them." *Id*.

[31] *See generally* Christopher Yoo, Promoting Broadband Through Network Diversity, Feb. 6,

Not only is Google's argument – that increased competition among network operators is potentially likely to result in an increased likelihood of discrimination by network operators – contrary to economic theory, it is contrary to what many other proponents of net neutrality regulation believe. The FTC Staff Report, based on information collected during a two day workshop with participants from all sides of the debate, concluded that "there appears to be substantial agreement on the part of both proponents and opponents of network neutrality regulation that more competition in the broadband Internet access area would benefit [not harm] consumers."[32] Google even contradicts itself, saying "lack of robust competition . . . enables and even invites discriminatory conduct."[33] The plain implication of that statement by Google is that the existence of robust competition, like what exists today, limits discriminatory conduct.

Google also invents a paradigm regarding existing broadband platform competition, suggesting two types of competition: (1) shallow (competition based on price and speed) and (2) deep (business model competition).[34] While Google cites no authority for its competition classifications, what is particularly puzzling about it is that while Google criticizes the current broadband provider market as having only the former form of competition, and not the latter, it simultaneously fears that the latter will occur, which according to Google's theory, is exemplified by "different business models and service packages."[35] One component of Google's strategy to thwart different business models is Google's advocacy to prevent any "application

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2006, *available at* http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp1&contentId=2935.

[32] FTC Staff Report, at 156.

[33] Comments of Google Inc., at 10 (emphasis added).

[34] *Id.* at 14.

[35] *Id.*

intelligence" within the network, insisting the Government step in to require it to only reside at the "edges."[36] Google's stance is solely grounded in what will benefit it, without any regard to the effects any such regulation would have on consumers.

B. Managing the Network is Not "Discrimination"

As explained in Hands Off The Internet's and others' initial comments, to handle the ever-increasing amounts of content being transmitted over the Internet, network management is necessary.[37] Many net neutrality regulation proponents believe that the only acceptable way to address the growing traffic is to expand capacity and finance that expanded capacity through increased charges to end-users. Broadband access providers want the option of using a much more reasonable multi-pronged approach to address growing traffic, a combination of network management, new business arrangements and expanded capacity, financed at least in part through new business arrangements. The multi-pronged approach keeps broadband access affordable for end-user consumers and therefore is the best way to continue to bring broadband to more consumers. Relying on expanded network capacity alone is cost prohibitive and would result in most consumers – even most of those who already have broadband services – being priced out of the market.

A new study released July 2, 2007, from researchers at Rennselaer Polytechnic Institute, the University of Nevada and AT&T Labs, confirms that a strategy of relying on expanded capacity alone is not feasible.[38] The study examined and compared the capacity requirements of

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[36] *Id.* at 3.

[37] Comments of Hands Off The Internet, at 22-25.

[38] Murat Yuksel, K.K. Ramakrishnan, Shivkumar Kalyanaraman, Joseph Houle, *Value of Supporting Class-of-Service in IP Backbones, available at* http://www.ecse.rpi.edu/Homepages/shivkuma/research/projects/cos-support.htm.

two simplified network management models. One network used undifferentiated best efforts to transmit all traffic. The other network utilized a tiered model of just two simple classifications. One classification was for most traffic and the other was for a wide array of high-bandwidth content. The study concluded that the required additional capacity for the undifferentiated network to deliver its content as efficiently as the two-tiered differentiated network was almost 60% higher.[39] And that was based on a moderate amount of traffic with a relatively small proportion of high-bandwidth traffic. With heavy demand on a network, the required extra capacity would be more than 100% higher.[40] The study demonstrates why an undifferentiated network is more expensive and less efficient.

Even some network neutrality regulation proponents acknowledge that a modicum of network management by broadband access providers is necessary and desirable, whether to halt "denial of service attacks" or to "prioritiz[e] all packets of a certain application type."[41] When discussing most other forms of QoS and network management tools, network neutrality proponents nonetheless refer to such practices pejoratively as "discrimination." It is important to clarify that the term "discrimination" is actually a misleading term. The FTC Staff Report clarifies that its use of "discrimination" in the context of broadband Internet access refers to "any form of product or service differentiation."[42] It is "not intended to have any negative connotation" and is "not necessarily anti-competitive or anti-consumer."[43] Proponents of new network neutrality regulations use the term strictly in the negative sense.

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[39] *Id.*

[40] *Id.*

[41] Comments of Google Inc., at 22.

[42] FTC Staff Report, at 71.

[43] *Id.*

Hands Off The Internet agrees that anti-consumer discrimination, specifically blocking websites or degrading service, should not be countenanced. As the Commission has concluded, and as explained in our initial comments, broadband access providers have not been engaging in anti-consumer discrimination.[44] However, many aspects of network management are necessary to deliver quality service to consumers and if such network management is pro-consumer, then it does not make sense to impose new regulations to address a non-existent problem.

As also discussed in the initial comments and as addressed in the FTC Staff Report, the unintended consequences of net neutrality regulation would be far-reaching and disruptive.[45] Regulatory proposals to address "discrimination," such as the one advanced by Google, highlight why such a regulatory regime would be misguided. On the one hand, Google acknowledges it is reasonable for a broadband provider to prioritize all packets of a certain application type such as streaming video.[46] On the other hand, Google argues that not including a ban based on "type" of traffic could lead to anticompetitive acts, arguing "broadband providers may have too much leeway to create and enforce type-based classifications whose sole purpose is to hinder

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[44] Quite simply, consumers would not stand for it. *See* FTC Staff Report, at 157 ("as long as consumers have one or more alternatives to which they can turn, it is difficult to imagine them accepting the blockage or elimination of content that is important to them.")

[45] *See* Comments of Hands Off The Internet, at 30-35; FTC Staff Report, at 159-60. The FTC Staff Report notes:

> The other ground for proceeding with caution in evaluating calls for network neutrality regulation is the potentially adverse and unintended effects of regulation generally – whether it is enacted in the area of broadband Internet access or any other area. Industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, despite the good intentions of their proponents. Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare reducing in the long term, particularly in terms of product and service innovation.

[46] Comments of Google Inc., at 22, 26.

competitors."[47] Putting aside the hyper-speculation inherent in Google's proposal, defining and determining acceptable "type" prioritization from unacceptable "type" prioritization or treatment through a regulatory regime is a daunting task, one certain to result in over or under-inclusiveness and years of litigation.[48]

The notion that current and emerging online applications can be separated with clear-cut, legally enforceable regulatory distinctions is absurd given the inevitable, ongoing convergence among these applications. Assume, for example, that a company providing a service such as WebEX were to merge with a VOIP provider to create a single unified service allowing multiple users to review documents online while engaging in voice conversation. Taking Google's application-based suggestion at face value, if a broadband provider offered enhanced treatment to VOIP traffic, it would then presumably have to separate the voice component of this new service from all the other data or else face liability. As expanding bandwidth allows mass-market convergence of applications as diverse as voice, gaming, and video streaming, Google's idea of application-specific regulation will quickly become a confusing, much-litigated regulatory relic. Moreover, even if, *arguendo*, some ideal regulatory accommodation could be reached that somehow miraculously resulted in optimal type-based classifications that did not hinder convergence, broadband access providers would then have to contend with entities that disguise their packets to look like packet "types" to take advantage of free QoS service.

C. Broadband Providers Merely Want the Ability To Enter Into Privately Negotiated Free Market Business Arrangements

It is not harmful discrimination to allow two businesses to enter into private contracts. Notably, no broadband provider has suggested that they intend to unilaterally dictate fees to

[47] *Id*. (emphasis added).

[48] *See* Comments of the National Cable & Telecommunications Association, at 14-15.

content providers and, given the increasingly competitive arena of broadband service, no broadband provider would be able to. What broadband providers are suggesting, however, is that there is no reason to adopt new regulations to prevent them from entering into private business arrangements that allow services to content providers under negotiated terms. In other words, broadband providers merely suggest that they want the opportunity to offer for a fee a service that a content provider might want to purchase.

Because it is less costly to provide a network with differential capacity rather than unlimited capacity, broadband access providers should have the ability to utilize their network management capabilities to more efficiently serve both consumers and content and applications providers. For example, online providers of more complex interactive applications such as multi-player online gaming require fast delivery (or low latency) of their traffic to provide desirable service to consumers. If there were even small delays in some of the associated packet transmissions, the gaming environment would be disrupted. On the other hand, an email service, which does not require low latency to effectively transmit its communications (a two second delay in receiving an email would likely not be noticeable) is not as concerned with ensuring a heightened level of service.[49] A gaming service may desire to purchase from a network owner some level of performance enhancement to avoid providing insufficient service.[50] Allowing the network provider to offer the service is not discriminatory – the use of that performance enhancement, or QoS, would not slow down other traffic, it would simply offer express delivery.

It may very well be that the network providers' service would be a cheaper and more welcome alternative than the purchase of extra server capacity from a third party at the "edge" of

[49] *See, e.g.*, Comments of Hands Off The Internet, at 24 (quoting John Mayo, *Net Neutrality: The Prequel*, AEI Brookings Joint Center Policy Matters 07012, Mar. 2007).

[50] *See, e.g.*, Comments of AT&T, at 63-66.

the network that might achieve the same effect. The service provider should be able to harness the free market to decide what option best serves its particular business model, not be unduly limited from an available option because of Government regulation focused on hypothetical harms.

V. CONCLUSION

Proponents of net neutrality regulations have failed to demonstrate that there is any current or anticipated content discrimination or service degradation justifying new regulation by the Commission or that current regulation and consumer protection laws are insufficient to address any potential harms. For all of the reasons addressed above and in our initial comments, the Commission should conclude that regulatory intervention in the broadband access market is unnecessary and not proceed with a notice of proposed rulemaking.

Respectfully submitted,

/s/

Christopher Wolf
Proskauer Rose LLP
1001 Pennsylvania Avenue, N.W.
Suite 400 South
Washington, D.C. 20004
(202) 416-6800

Counsel for Hands Off The Internet

Mike McCurry
Christopher Wolf
Co-Chairs
Hands Off The Internet
Post Office Box 3840
Arlington, VA 22203-0840

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